



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 29, 1993

Mr. Todd K. Brown
Executive Director
Texas Workers' Compensation Commission
Southfield Building
4000 South IH-35
Austin, Texas 78704

OR93-375

Dear Mr. Brown:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, V.T.C.S. article 6252-17a. Your request was assigned ID# 18831.

The Texas Workers' Compensation Commission (the "commission") received a request for all information regarding a specific complaint made on the commission's safety hotline. The complaint alleges a violation of health and safety laws by the complainant's employer. You inform us that when the commission received the complaint, it contacted the employer and the employer's workers' compensation insurance carrier. You say you asked the employer and the insurance carrier to investigate the complaint and to inform the commission about any steps taken to eliminate any unsafe conditions or practices. The employer interviewed several employees during its investigation of the complaint. As responsive to this open records request, you have submitted the results of these interviews as well as a letter from the employer that contains a summary of the results of the interviews. You assert that the interview results and the employer's letter are excepted from required public disclosure based on the informer's privilege aspect of section 3(a)(1) of the Open Records Act. You also assert that section 3(a)(11) of the Open Records Act excepts from required public disclosure the draft of a letter the commission sent the complainant.

You contend that the identities of those employees who were interviewed by the employer are within the informer's privilege aspect of section 3(a)(1) of the Open Records Act. Section 3(a)(1) of the Open Records Act excepts from required public disclosure information deemed confidential by judicial decision. Section 3(a)(1) incorporates the "informer's privilege," which is recognized by Texas courts. See

Aguilar v. State, 444 S.W.2d 935 (Tex. Crim. App. 1969). The privilege protects the identity of persons who report possible violations of law to officials who have a duty to enforce particular laws. Open Records Decision No. 515 (1988). Although the privilege ordinarily applies to the efforts of law enforcement agencies, it can apply to administrative officials with a duty of inspection or law enforcement. Attorney General Opinion MW-575 (1982); Open Records Decision No. 515 (1988). When information does not describe conduct that violates the law, the informer's privilege does not apply. Open Records Decision No. 582 (1990).

A school district is responsible for maintaining law and order on each of its campuses. See Educ. Code § 21.305; 19 T.A.C. §§ 61.168; 61.71. One of the employees' statements contains an allegation of a violation of section 22.01(a)(2) of the Penal Code.¹ Therefore, you must not disclose the identity of the individual who made that statement based on the informer's privilege. However, the survey on which the statement appears does not contain the name of the informer. Nor does the informer's survey contain any statements or information that tends to identify the informer. A few of the other surveys do contain information that tends to identify the interviewee, but the identities of these other interviewees are not protected, since they do not allege a violation of a law. Complaints about a public employee's work performance which reveal no allegations of law are not protected by the informer's privilege aspect of section 3(a)(1) of the Open Records Act. See Open Records Decision No. 515 (1988).

Fourteen employees were interviewed by the superintendent during the investigation of the complaint. The letter from the superintendent of the school district to the commission discloses the job position of each interviewee. You assert that the informer's privilege applies to the information that reveals the job position of each interviewee. While information about the job position of each interviewee does identify that employee, such information, standing alone, does not identify the employee who is the informer. Thus, you may not withhold portions of the letter that disclose the job position of each interviewee based on the informer's privilege.

You did not mark the statements in the surveys which you consider to be identifying. We think that three of the surveys contain statements which arguably tend to identify the interviewee. Thus, the question becomes whether the fact that three employees can be identified from a group of fourteen known employees permits the requestor, through the process of elimination, to identify the one employee who is the

¹You have not demonstrated that any of the employees' statements contain allegations of violations of an occupational health and safety law. In fact, the draft of the letter sent to the complainant indicates that the commission did not conclude that any of the fourteen employees alleged a violation of an occupational health and safety law.

informer. We do not think that information that discloses that the informer is one employee from a group of eleven known employees is information that identifies that informer. Thus, the informer's privilege does not apply to the statements that tend to identify three of the interviewees.

With regard to the draft of the letter the commission sent to the complainant, you claim that section 3(a)(11) of the Open Records Act applies since the letter is "an intra-agency memorandum containing recommendations, opinions, and advice about the proper response to the person who made the complaint." Prior decisions of this office have applied section 3(a)(11) to preliminary drafts of a document where the release of the draft would reveal the deliberative process by indicating where additions and deletions were made. See Open Records Decision No. 559 (1990). However, for several months now, the effect of the section 3(a)(11) exception has been the focus of litigation. In *Texas Dep't of Public Safety v. Gilbreath*, 842 S.W.2d 408, 413 (Tex. App.--Austin 1992, no writ), the Third Court of Appeals held that section 3(a)(11) "exempts those documents, and only those documents, normally privileged in the civil discovery context."

We are currently reviewing the status of the section 3(a)(11) exception in light of the *Gilbreath* decision. In the meantime, we are returning the draft of the letter the commission sent to the complainant and asking that you once again review the draft letter and your initial decision to seek closure of it. We remind you that it is within the discretion of governmental bodies to release information that may be covered by section 3(a)(11). If, as a result of your review, you still desire to seek closure of the draft letter, you must resubmit your request and the draft letter, along with your arguments for withholding it pursuant to section 3(a)(11). You must submit these materials within 15 days of the date of this letter. This office will then review your request in accordance with the *Gilbreath* decision. If you do not timely resubmit the request, we will presume that you have released the draft letter.

We also note that one of the surveys contains the name of a student. The Texas Open Records Act incorporates the Family Educational Rights and Privacy Act (FERPA). See V.T.C.S. article 6252-17a § 14(e). FERPA generally limits the release of education records of students without the written consent of their parents. 20 U.S.C. § 1232g(b)(1). Education records are records which "contain information directly related to a student" and "are maintained by an educational agency or institution." See *id.* § 1232g(a)(4)(A). Section 14(e) of the Open Records Act may not be used to withhold entire documents, but rather, only information that identifies a student. Open Records Decision No. 332 (1978). Thus, you must withhold the name of the student from required public disclosure. We have marked the survey accordingly.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay H. Guajardo
Assistant Attorney General
Opinion Committee

KHG/TCC/le

Ref: ID# 18831

Enclosures: submitted documents

cc: Mr. Ronald R. Green
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(w/o enclosures)